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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

NO. 79-5962

* * *

DANNY VINCENT,
Appellant

V.

THE STATE OF TEXAS,
Appellee

* * *

On Appeal From The Texas Court Of Criminal Appeals

* * *

MOTION OF APPELLEE STATE OF TEXAS TO DISMISS OR AFFIRM

* * *

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

TED L. HARTLEY
Executive Assistant Attorney General

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

DAWN BRUNER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR APPELLEE

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On Appeal From The Texas Court Of Criminal Appeals

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MOTION OF APPELLEE STATE OF TEXAS TO DISMISS OR AFFIRM

* * *

The Attorney General of Texas, on behalf of the State of Texas, Appellee herein, moves to dismiss the appeal or affirm the judgment of the Texas Court of Criminal Appeals in this case. Rule 16(1)(a), and (b).

OPINIONS BELOW

Appellant Danny Vincent seeks review in this Court of a decision entered by the Texas Court of Criminal Appeals, a copy of which is attached as Appendix A to Vincent's Jurisdictional Statement.

JURISDICTION

The Texas Court of Criminal Appeals entered its last opinion in this case on September 19, 1979. Rehearing was denied on October 10, 1979. Contrary to the statement in Vincent's Appendix D, a Notice of Appeal has never been filed with the Texas Court of Criminal Appeals, the court possessed of the record. (See Appellee's Appendix A).

Rule 11(1) of the Rules of this Court provides:

> 1. An appeal to review the judgment of a state court of last resort in a criminal case shall be deemed in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the court possessed of

> the record within ninety days after the entry of such judgment and the case is docketed within the time provided in Rule 13.

The ninety day period for filing a Notice of Appeal has elapsed.

Vincent invokes the jurisdiction of this Court under 28 U.S.C. §1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Vincent, who claims a right under the Fourteenth Amendment to the Constitution of the United States, wishes the Court to declare art. 42.12(8)(a), V.A.C.C.P., unconstitutional. The pertinent part of art. 42.12(8)(a), V.A.C.C.P., provides:

> At any time during the period of probation the court may issue a warrant for violation of any of the conditions of the probation and cause the defendant to be arrested.... A probationer so arrested may be detained in the county jail or other appropriate place of detention until he can be taken before the court. Such officer shall forthwith report such arrest and detention to such court. If the defendant has not been released on bail, on motion by the defendant the court shall cause the defendant to be brought before it for a hearing within 20 days of filing of said motion, and after a hearing without a jury, may either continue, modify, or revoke the probation. The court may continue the hearing for good cause shown by either the defendant or the state. If probation is revoked, the court may proceed to dispose of the case as if there had been no probation, or if it determines that the best interests of society and the probationer would be served by a shorter term of imprisonment, reduce the term of imprisonment originally assessed to any term of imprisonment not less than the minimum prescribed for the offense of which the probationer was convicted.

QUESTION PRESENTED

Whether art. 42.12(8)(a), V.A.C.C.P., on its face and as applied, affords probationers such complete due process safeguards that a mandated preliminary hearing to determine probable cause for probation revocation is not necessary?

STATEMENT OF THE CASE

Danny Vincent, Appellant herein and defendant below, pled guilty to the offense of burglary on May 23, 1977,

in the 84th Judicial District Court of Ochiltree County, Texas, Case No. 1494. His punishment was assessed on that day as a $2,000.00 fine and six (6) years in the Texas Department of Corrections, probated. (Record v. 1, p. 6-7, hereinafter R. v. __, p. __).

On February 3, 1978, Vincent was arrested for Driving While Intoxicated, art. 6687b §30, V.A.T.S., and taken to the Perryton, Texas, sheriff's office where he was met by his probation officer, Jeff Hooper. (R. v. 2, p. 49). At this time Probation Officer Hooper gave Appellate Vincent his Miranda warnings. (R. v. 2 p. 30). A Motion For Warrant and to Revoke Probation was filed with the 84th Judicial District Court on the next day. (R. v. 1 p. 12). Vincent remained in jail from February 3, 1978 until March 28, 1978 (R. v. 2 p. 76).

After approximately two weeks in jail, Vincent was visited by Probation Officer Hooper who inquired whether Appellant had a lawyer and advised Vincent to retain one. (R. v. 2 p. 77). During the time he was in jail Vincent and his family unsuccessfully attempted to speak with a lawyer (R. v. 2 p. 76).

On March 2, 1978, a Notice of Hearing setting a hearing to determine why probation should not be revoked was filed with the court, and the hearing was set for March 27, 1978. (R. v. 1 p. 16). On March 27, 1978 the court appointed Robert McCutcheon as counsel for Vincent (R. v. 1 p. 23), heard formal pre-hearing motions (R. v. 1 pp. 17-20), and ordered Vincent's bond reduced (R. v. 1, p. 24).

A formal probation revocation hearing was held before the 84th District Court of Ochiltree County, Texas, on April 10, 1978. Three witnesses, including Probation Officer Hooper and the arresting police officer, testified for the State of Texas and three witness, including Vincent, testified for the defense. Vincent admitted at the hearing that he had violated the terms and conditions of his probation by

drinking and driving. (R. v. 2, pp. 83-84).

Appellant Vincent's probation was revoked by the Judge Countiss of the 84th District Court on June 1, 1978 (R. v. 1, pp. 28-30), and he was sentenced by the court to six (6) years in the Texas Department of Corrections July 7, 1978 (R. v. 1, p. 32).

The trial court record is vague as to certain aspects of this case. It does not reflect whether or not Vincent ever made a motion invoking the art. 42.12(8)(a) rule that a court must provide a probationer in jail a final hearing within twenty days of the probationer's motion. It does not indicate whether the court, State or Vincent instigated the March 2, 1978 Notice of Hearing. (R. v. 1 p. 16). Finally it does not reflect when and how Vincent's first bond was set although it does indicate a bond reduction on March 28, 1978. (R. v. 1 p. 24).

Vincent appealed to the Texas Court of Criminal Appeals challenging the probation revocation on grounds much like his grounds of appeal to this Court. (1) Art. 42.12(8)(a) V.A.C.C.P., is unconstitutional on its face for failure to provide a preliminary hearing and the attendant safeguards of Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) and Gagnon v. Scarpelli, 411 U.S. 778, 93 S.C. 1756, 36 L.Ed.2d 656 (1973) and (2) art. 42.12(8)(a) is unconstitutional as applied to Appellant Vincent for failure to provide a preliminary hearing and the attendant safeguards of Morrissey v. Brewer, supra, and Gagnon v. Scarpelli, supra. Although the record indicates the trial court could not have complied with a twenty day limit for hearing the probation revocation, Appellant did not challenge the time discrepancy on appeal.

The Texas Court of Criminal Appeals affirmed the revocation in Vincent v. State, 586 S.W.2d 880 (Tex.Crim.App. 1979), an unpublished opinion (attached as Appendix A to Appellant's Brief). Motion for Rehearing was denied October 10, 1979.

MOTION TO DISMISS

This appeal should be dismissed for four reasons. They are as follows:

A. THE APPEAL IS NOT TIMELY.

As noted in the jurisdiction section, supra, contrary to Rule 11(1) of the Rules of this Court, Vincent's Notice of Appeal has never been received by the Texas Court of Criminal Appeals. The appeal should be dismissed pursuant to Richardson v. Blumenthal, 435 U.S. 939, 98 S.Ct. 1516, 55 L.Ed.2d 539 (1978); Gabriel v. United States, 429 U.S. 877, 97 S.Ct. 225, 50 L.Ed.2d 160 (1976); Charger Investments, Inc. v. Corbett, 429 U.S. 877, 97 S.Ct. 225, 50 L.Ed.2d 159 (1976); Taggart v. New York, 392 U.S. 667, 88 S.Ct. 2317, 20 L.Ed.2d 1360 (1967).

B. STATE LAW PROVIDES MORE PROTECTION OF APPELLANT'S RIGHTS THAN DUE PROCESS REQUIRES.

The present case is not an appropriate one in which to consider whether the Texas probation revocation procedures are unconstitutional. Through art. 42.12(8)(a), V.A.C.C.P., the State of Texas affords a probationer a final hearing on the revocation of probation within twenty days of a motion by a probationer who is in jail and unable to make bail.

This state created right to a speedy final hearing fulfills the due process consideration of providing a preliminary hearing for a probationer in that information is fresh, sources are available and there is no substantial time lag between the arrest and the final hearing. Morrissey v. Brewer, supra at 485.

C. THE RECORD FAILS TO ADEQUATELY REFLECT WHETHER APPELLANT VINCENT REQUESTED A PROBATION REVOCATION HEARING.

In this case, Vincent failed to avail himself of the art. 42.12(8)(a) provision for a speedy final adjudication of the probation revocation question. A careful review of the trial court record reveals no evidence of Vincent utilizing the art. 42.12(8)(a) twenty day provision by making a motion for the trial court to conduct a revocation hearing.

D. APPELLANT VINCENT FAILED TO PURSUE HIS STATE COURT REMEDIES.

Even if Vincent made such a motion for the court to conduct a probation revocation hearing before the trial court's order setting a hearing date, there is a twenty-six day time lapse between the March 2, 1978 court order and the March 28, 1978 hearing setting. (R. v. 1, p. 15). This twenty-six day period violates the art. 42.12(8)(a) twenty day statutory period. Although under the statute a trial court may continue the hearing for good cause shown by either the defendant or the state, no such evidence can be found in the record.

The Texas courts have construed the art. 42.12(8)(a) twenty day time period as a mandatory provision which requires the state to dismiss its motion to revoke probation if the time requirement is not complied with. Carney v. State, 573 S.W.2d 24, 26 (Tex.Crim.App. 1978); Ex parte Trillo, 540 S.W.2d 728, 732 (Tex.Crim.App. 1976). Yet in his direct appeal to the Texas Court of Criminal Appeals, Appellant chooses not to challenge the trial court's violation of a mandatory law. Cf. Cleland v. State, 572 S.W.2d 673, 674 (Tex.Crim.App. 1978). Appellant's only ground of appeal to the Texas court was a constitutional issue. Under these circumstances, it is unnecessary to decide whether a federal constitutional right to a preliminary hearing to determine if probable cause for probation revocation exists. Any such right is encompassed within the state created right to a speedy final hearing. Appellant failed to demand and preserve such a right.

MOTION TO AFFIRM

Art. 42.12(8)(a), on its face and as applied, affords probationers such complete due process safeguards that a mandated preliminary hearing to determine probable cause for probation revocation is not necessary.

Probation revocation procedures in Texas are closely related to formal criminal proceedings unlike the "typical" parole procedures recognized in Morrissey v. Brewer, 408 U.S. 471, 484, 92 S.Ct. 2593, 2602, 33 L.Ed.2d 484, 496

(1972) and the informal probation proceedings recognized in Gagnon v. Scarpelli, 411 U.S. 778, 789, 93 S.Ct. 1756, 1763, 36 L.Ed.2d 656, 665 (1973). Whisenant v. State, 557 S.W.2d 102, 104-05 (Tex.Crim.App. 1977). The Texas Court of Criminal Appeals has used this rationale to determine that Gagnon v. Scarpelli, supra, is inapplicable to Texas probation revocation proceedings. Whisenant v. State, supra at 103; Grant v. State, 505 S.W.2d 259, 260 (Tex.Crim.App. 1974); Ex parte Shivers, 501 S.W.2d 898, 900-01 (Tex.Crim.App. 1973).

A granting of probation in a Texas adjudication of guilt suspends the sentence until a judgment of revocation. [Arts. 42.12(3), 42.13(3), V.A.C.C.P., Clapper v. State, 562 S.W.2d 250, 252 (Tex.Crim.App. 1978); Savant v. State, 535 S.W.2d 190, 191 (Tex.Crim.App. 1976); Texas Attorney General Opinion M-W 133 (1980)]. As a result, the probation revocation procedure itself becomes an adversary proceeding where the rules of evidence and procedure are very similar to those of a criminal proceeding. Whisenant v. State, supra at 105; Masters v. State, 545 S.W.2d 180, 181 (Tex. Crim.App. 1977). The hearing is conducted before a judge of the district court. Art. 42.12(8)(a), V.A.C.C.P; Whisenant v. State, supra at 105; McClure v. State, 496 S.W.2d 588, 591 (Tex.Crim.App. 1973): Guillory v. State, 487 S.W.2d 327, 329 (Tex.Crim.App. 1972). The judge, upon request, makes specific findings of fact concerning the revocation. Whisenant v. State, supra, at 105; Sappington v. State, 508 S.W.2d 840, 841-42 (Tex.Crim.App. 1974); Guillory v. State, supra at 329; Gamble v. State, 484 S.W.2d 713, 715-16 (Tex.Crim.App. 1972).

Procedural differences between formal criminal trials and Texas probation revocation hearings include proof by preponderance of the evidence, [Wiersing v. State, 571 S.W.2d 356, 356 (Tex.Crim.App. 1972), Lovorn v. State, 536 S.W.2d 356, 356 (Tex.Crim.App. 1976)], allowing uncorraborated witness testimony at the hearing, [Richardson v. State, 487 S.W.2d

719, 721 (Tex.Crim.App. 1972)], and upon motion of the defendant, hearing the probation revocation within twenty days [Art. 42.12(8)(a), V.A.C.C.P., Carney v. State, supra at 26; Ex parte Trillo, supra at 732].

Because the Texas revocation procedures so closely resemble formal criminal procedures, the Texas Court of Criminal Appeals has consistently extended constitutional rights to probationers at revocation hearings including protection from unreasonable searches and seizures [Tamez v. State, 534 S.W.2d 686, 692 (Tex.Crim.App. 1976)], protection from confessions taken through the exploitation of an illegal arrest [Dowdy v. State, 534 S.W.2d 336, 338 (Tex.Crim.App. 1976)], a right to counsel at all probation revocation hearings [Ex parte Shivers , 501 S.W.2d 898, 899 (Tex.Crim.App. 1973); Richardson v. State, 487 S.W.2d 719, 721 (Tex.Crim.App. 1972); Crawford v. State, 435 S.W.2d 148, 149 (Tex.Crim.App. 1965)], and a right to speedy trial [Carney v. State, supra at 26].

A careful reading of both Morrissey v. Brewer, supra, and Gagnon v. Scarpelli, supra, indicate that the Texas Court of Criminal Appeals is correct in deciding that the preliminary hearing requirement of Gagnon v. Scarpelli is not necessary to Texas probation revocation laws because those laws fully provide due process standards. In Morrissey v. Brewer this Court supports the Texas court's decision:

> (Due process's) flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure. Supra at 481.

This Court in Morrissey v. Brewer, supra establishes a due process structure for probation revocation proceedings, but notes the type of process considered:

> There is typically a substantial time lag between the arrest and the eventual determination by the parole board whether

parole should be revoked. Supra at 485. (Our underlining).

The Morrissey "typical" process of parole revocation does not conform with the formal, twenty days Texas probation revocation process. In Gagnon v. Scarpelli, supra, this Court applied the Morrissey v. Brewer parole procedures to probation revocation cases. But again, this Court focused on a probation revocation procedure entirely different from the Texas procedure.

> In short, a criminal trial under our system is an adversary proceeding with its own unique characteristics. In a revocation hearing, on the other hand, the State is represented, not by a prosecutor, but by a parole officer with the orientation described above; formal procedures and rules of evidence are not employed; and the members of the hearing body are familiar with the problems and practice of probation or parole.

Gagnon v. Scarpelli, supra at 789.

Further, the Texas probation revocation procedures comply with the due process considerations established in Morrissey v. Brewer, supra and Gagnon v. Scarpelli, supra. The Morrisey v. Brewer minimum requirements of due process, supra at 489, as applied through Gagnon v. Scarpelli, supra at 786 were:

> "(a) written notice of the claimed violations of [probation or] parole; (b) disclosure to the [probation or] parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation or] parole."

Texas revocation proceedings fulfill each requirement.

Although Texas does not have an established preliminary hearing procedure to determine probable cause of a probation

violation, that the art. 42.12(8)(a), V.A.C.C.P., requirement, upon motion of a defendant in jail, that a revocation hearing be conducted within twenty days fulfills the spirit of the Morrissey v. Brewer preliminary hearing stage. This Court's preliminary hearing considerations were that the hearing be conducted while "information is fresh and sources are available." Supra at 485. The twenty day hearing provision clearly fulfills those requirements.

In light of the fact that the Texas probation revocation procedure is essentially conducted as a criminal trial, that the Texas Court of Criminal Appeals has consistently provided constitutional safeguards to probationers at their revocation hearing, that a careful reading of Morrissey v Brewer, supra, and Gagnon v. Scarpelli, supra, indicates this Court was not addressing Texas-type procedure, and that the Texas probation revocation provision complies with the due process standards of Morrissey v. Brewer, supra, and Gagnon v. Scarpelli, supra, the Texas Court of Criminal Appeals correctly upheld Vincent's probation revocation.

CONCLUSION

For the reasons stated, this appeal should be either dismissed or affirmed.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER
First Assistant Attorney General

TED L. HARTLEY
Executive Assistant Attorney General

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

DAWN BRUNER
Assistant Attorney General

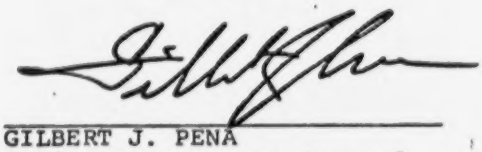
P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR RESPONDENT

PROOF OF SERVICE

I, Gilbert J. Pena, Assistant Attorney General of Texas, hereby certify that a copy of the above Motion Appellee State of Texas to Dismiss or Affirm has been served by placing same in the United States mail, postage prepaid, certified, on this the 25th day of March, 1980, addressed to:

Mr. Robert D. McCutcheon
P.O. Box 1066
Perryton, Texas 79070



GILBERT J. PENA
Assistant Attorney General

E X H I B I T "A"

CLERK'S OFFICE

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

I, THOMAS LOWE, Clerk of Criminal Appeals of Texas, do hereby certify that in Cause No. 60,564 styled:

DANNY VINCENT, Appellant

VS.

THE STATE OF TEXAS, Appellee

the judgment of the 84th Judicial District Court of Ochiltree County, Texas was affirmed on September 19, 1979, on October 10, 1979 the appellant's motion for rehearing en banc was denied and on October 12, 1979 the mandate of this Court issued.

THEREFORE, WITH THE DENYING OF THE APPELLANT'S MOTION FOR REHEARING EN BANC this cause was disposed of by this Court on October 10, 1979, the appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas and the judgment has now become final on the docket of this Court.

I further certify that the Texas Court of Criminal Appeals is possessed of the full record in this case, including both the trial record and appellate record.

I further certify that I have reviewed the Texas Court of Criminal Appeal's docket entries and all documents filed with said court by Danny Vincent and I do not find that Appellant Vincent has filed a Notice of Appeal to the United States Supreme Court with the Texas Court of Criminal Appeals.

WITNESS my hand and the seal of said Court, at my office in Austin, Texas this the 25th day of MARCH A.D. 1979.

Thomas Lowe

THOMAS LOWE, Clerk of the
COURT OF CRIMINAL APPEALS
OF TEXAS